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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 862

HERMAN A. HINZE, CARL E. STURM, ENDRE A. SHARPEE, ET AL.,

Petitioners,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE WISCONSIN MUTUAL INSURANCE COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE WISCONSIN MUTUAL INSURANCE COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

To the Honorable, the Chief Justice, and the Associate Justices:

Your petitioners, Herman A. Hinze, Carl E. Sturm, Endre A. Sharpee, B. F. Riplinger, F. Schultheiss, Alvin A. Handrich, Palmer H. Sharpee, Marcel Schwab, Cleo A. Edington, Arthur Karow, Gus Hamm, Marie Larsen, Charles Bond, Florian Gasser, Charles Zietlow, Linus Schwab, Florence Schwab, Fred W. Folker, George Manthe, Jerome Manthe, Peter J. Hilgers, Edward Bowden, Blizard Brothers, Earl Blizard, Melvin Westland, Monford C. Obrecht, Christ Obrecht, B. W. Stuart, Julius W. Schultz,

W. H. Herling, Lee C. Hottmann, Adolph Bischoff, Theo. Christian, James J. Cummings, John Marks, Ronald J. Quade, F. Earl Palmer, Checker Yellow Cab, Inc., James H. Henderson, Roy Walsh, Herman Zietlow, Jay and Evelyn Frisher, S. J. Murphy, Frank Mongin, Herbert A. Carlson, Math. Schmitz, Clarence F. LaFleur, Ray Rosen, Ben Vincent and J. C. Jorgersen, et al., pray for the issuance of a writ of certiorari to review a judgment of the Supreme Court of the State of Wisconsin, entered November 10, 1942, in the cause entitled "In Re Liquidation of the Wisconsin Mutual Insurance Company", which judgment became final on December 29, 1942, affirming three orders of the Circuit Court for Dane County, State of Wisconsin. The opinion of the Supreme Court of the State of Wisconsin appears in the record herein (R. 124-140), and is reported at this time in 241 *Wisconsin* 394 and in 6 *Northwestern* (2) 330.

Summary of Actions in the State Courts.

This petition is filed to obtain a review of the judgment of the Supreme Court of the State of Wisconsin affirming three orders in re Liquidation of the Wisconsin Mutual Insurance Company, by fifty-one (51) petitioners for themselves and for over one thousand other former policyholders of the company. These policyholders were assessed in excess of $75,000 (R. 34) of a total assessment of approximately $491,000 to pay part of the alleged total losses and expenses of $189,000, during the period of time January 1, 1937, to February 1, 1941.

The proceedings were begun on the 5th day of February, 1941, upon petition of Morvin Duel, Commissioner of Insurance for the State of Wisconsin, asking for liquidation of the said company under sections 200.08 and 200.09 of the Wisconsin statutes. On petition of the Commissioner, dated September 18, 1941, praying for an order to show

cause why he should not be authorized to make an assessment of $480,000 against former policyholders, the Circuit Court for Dane County, State of Wisconsin, entered an order to show cause for a hearing. On the return date (November 10, 1941) the matter was adjourned without a hearing to November 27, 1941 (R. 9, 10) at which time the only witness to testify was Lloyd J. Yaudes, special deputy commissioner of insurance (R. 58-84). At said time a request for further adjournment in order to give policyholders an opportunity to present testimony was made by Herman A. Hinze, a policyholder and a petitioner herein (R. 82). Former appearances were made by two other policyholders represented by counsel (R. 10). The order was entered on November 29, 1941, without further hearing.

The order levied an assessment of 100%, in the amount of approximately $491,000, of the premiums earned during the period January 1, 1937, to February 1, 1941, to pay up estimated losses and expenses of $189,000, which sum included $40,000 to cover attorneys' fees and liquidation expenses (R. 10-14). Thereafter individual notices of assessment (to be paid up in 20 days) were sent to all former policyholders, accompanied by a letter (dated February 10, 1942) from the Commissioner of Insurance (R. 31-34). On February 28, 1942, your petitioners, Sturm and Hinze, for themselves and as representatives of over six hundred other policyholders (R. 14) obtained an order to show cause, returnable on April 1, 1942, why the order of November 29, 1941, should not be annulled, vacated and set aside, and why an opportunity should not be given to introduce evidence on a number of listed objections to the assessment (R. 15-34). Said order to show cause was heard on April 1, 1942, on argument of counsel alone. On April 21, 1942, without decision having been rendered on the former show cause order, your petitioner, Endre A. Sharpee, for himself and as a member of a protective committee composed of

over one thousand policyholders, obtained an order to show cause why the order of November 29, 1941, should not be reopened and set aside and trial had, incorporating by reference all matters contained in the former order to show cause. Said petition was based entirely on lack of service on or notice to the "insurance company, its officers or its policyholders" (R. 34).

Said petition was supported by the affidavits of 48 other policyholders (petitioners herein) to the effect that they had received no notice of the proposed order of November 29, 1941, and that their only notice was the "First" and "Second Notice of Assessment" (R. 40-46). Said order to show cause was heard on April 24, 1942, on argument of counsel and submission of briefs, and the Circuit Court for Dane County, State of Wisconsin, entered two orders on May 26, 1942, denying both motions (R. 56). Appeal from all three orders was taken to the Supreme Court of the State of Wisconsin (R. 121-122).

Upon appeal, the Supreme Court of the State of Wisconsin, on September 18, 1942, heard arguments of counsel (R. 124) and requested the appellants (your petitioners) to confine themselves to the order of November 29, 1941, in the brief to be printed, with the right later to submit questions on the two orders (May 26, 1942) of the lower court (R. 153, 155). Thereafter the court entered its judgment affirming the order of November 29, 1941 (R. 124), with an opinion (R. 125-140) and its judgment affirming the May 26th orders entered by the lower court, which refused to annul, vacate and set aside the order of November 29, 1941, or to grant trial to these petitioners on said order, without giving these petitioners an opportunity to discuss their right to have the May 26th orders set aside, as based on the orders to show cause, dated February 28, 1942, and April 21, 1942. No opinion on the last two orders was rendered except for the statement that "the or-

ders appealed from which denied the motions made by appellants to set aside the order of November 29, 1941, should be affirmed'' (R. 148). Thereupon motion and brief for rehearing were duly made and filed (R. 141-143) based on the right of these petitioners to have the two orders of May 26, 1942, considered and reopened and trial had, setting up specific grounds of objection. The State Supreme Court considered the same and denied the motion on December 29, 1942 (R. 210).

This petition for writ of certiorari is filed March 29, 1943, within three months of the time when said judgment became final, and there is presented herewith a certified copy of the entire record and proceedings in connection with the said three orders, including proceedings in the Supreme Court of the State of Wisconsin. This record is composed of the printed case used in the Supreme Court, as certified to this Court, the opinion of the Supreme Court of the State of Wisconsin, and the proceedings therein, including appellants' (petitioners here) brief and motion for rehearing.

Questions Presented.

I.

Does the action of the Insurance Commissioner of the State of Wisconsin and the judgment of the Supreme Court of the State of Wisconsin, in levying an assessment without personal service and without mail notice, and without "service by publication in special proceedings", contravene the 14th Amendment to the Constitution of the United States?

Are not these petitioners deprived of their rights, privileges and immunities, as secured to them and to other citizens of the United States and of the State of Wisconsin, by the Federal Constitution and the laws of the United States—by this action? Are not they deprived of liberty

and property without due process of law, and without the equal protection of the laws?

II.

Do the action of the Insurance Commissioner of the State of Wisconsin, and the judgment of the Supreme Court of the State of Wisconsin, in denying policyholders their right to a trial, contravene the 14th Amendment to the Constitution of the United States?

Are not these petitioners deprived of their rights, privileges and immunities, as secured to them and to other citizens of the United States and of the State of Wisconsin, by the Federal Constitution and the laws of the United States —by this denial? Are not they deprived of liberty and property without due process of law, and without the equal protection of the laws?

III.

Do not the failure of the Insurance Commissioner of the State of Wisconsin and the failure of the State of Wisconsin, to make the "proof required for service by publication in special proceedings" (under sections 262.12-262.14, Wisconsin statutes) constitute a violation of the constitutional guarantee of due process of law and equal protection of the laws? Does not this failure to use the statutory provisions for publication mean a discriminatory grant of special and exclusive privileges to other citizens of Wisconsin and of the United States, but denied to these policyholders and citizens?

IV.

Does not the decision of the Supreme Court of the State of Wisconsin, in respect to its holding that refunds are an adequate means of correcting assessment liability, consti-

tute a taking of property without the due process of law guaranteed by the 14th Amendment and by the laws and statutes of the United States?

V.

Does not this assessment constitute an impairment of the obligation of contract under Article I, section 10, of the Constitution of the United States?

Jurisdictional Statement.

This Court has jurisdiction under Section 237b of the Federal Judicial Code (28 U. S. C. A., 344 (b)), as amended, to review in certiorari the action of the court below, where any title, right, privilege or immunity is specially set up or claimed under the Constitution.

The title, right, privilege or immunity specially set up or claimed by these petitioners, under the Constitution, is contained in the 14th Amendment as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And title, right, privilege or immunity specially set up or claimed under the Constitution, is contained in Article I, Section 10, as follows:

> "No state shall * * * pass any bill of attainder, ex post facto law, or *law impairing the obligation of contracts,* * * *."

Reasons Relied Upon for Allowance of Writ.

Your petitioners respectfully show to this Court that this is a case of great importance, because it involves the

determination of the fundamental privileges, rights and immunities granted them as citizens of the United States, as detailed below:

A. Involved are not only the rights, privileges and immunities of these petitioners, and of 600 other policyholders for whom they were acting when the first order to show cause was signed (February 28, 1942, R. 14-34) and those of the 1,000 or more policyholders whom they represented at the time of securing the second order to show cause (April 21, 1942, R. 34-46), but those of several hundred other policyholders who have joined and given their authority for representation subsequent to the decision of the Supreme Court of the State of Wisconsin (decision November 10, 1942, rehearing decision, December 29, 1942). Therefore it is desirable, if it is possible, to cover all situations. Some petitioners have already paid said assessment, but the great majority of policyholders have not so paid, all of the approximately 9,000 policyholders having received notice to pay or be sued (R. 31).

The petitioners at no time have denied their liability to pay an assessment, and their only objection is that it shall be a fair assessment, ascertained after a full hearing.

Your petitioners call attention to the fact that the acts complained of are those of the State of Wisconsin, through its Commissioner of Insurance, under his powers as liquidator in the first instance, acts later approved by the Supreme Court of the State of Wisconsin in its decision, and therefore acts which have the benefit of that body of law applying to the acts of a state officer, administrator or commissioner.

B. Your petitioners allege as a reason for the allowance of this writ that their rights have been violated by failure to give them actual notice or to make actual service of the proposed order to show cause which resulted in the assess-

ment order of November 29, 1941, and which was a conclusive determination of their collective liability and as such violates the due process clause of the 14th Amendment. Equal protection of the laws was denied these petitioners by the failure to apply or follow the provisions of the statute for "Service By Publication In Special Proceedings" (Wisconsin Statutes, Sections 262.12 to 262.14). Your petitioners allege that (a) no proof by affidavit of the necessity of publication was made, as required; (b) such publication as was made in only one (Madison, Wis.) newspaper was not "likely to give notice" to policyholders living in all parts of the State, and (c) a copy of the summons and complaint (or object of the action) was not mailed, as required (R. 8, 34, 37).
contentions:

C. When actual notice was received by these petitioners in the form of a first and second notice to pay within 20 days, due application was made to reopen and have trial on the order of November 29, 1941. This was denied on May 26, 1942, by the lower court; and therefore these petitioners allege that they have been deprived of their day in court and opportunity to complete a record on which a fair and full decision could have been based. They allege it was never intended that their supporting affidavits to the respective orders to show cause, should, or could, become the basis of a decision on the merits, and were introduced solely for the purpose of securing a hearing. They further contend that it was a denial of due process for both the trial and appellate courts to give their decisions on the merits without further evidence in the face of the following contentions:

1. Estimates of policyholders' liability were grossly distorted (R. 16, 18, 19, 25, 27, 28).

2. Uncollectibility was greatly exaggerated.

3. The need for separation or distinction between automobile and liability policyholders (because of the difference in loss ratios) was ignored and denied (R. 23).

4. Preferences were granted (R. 26, 27).

5. Certain creditors' claims were invalid, excessive and fraudulent (R. 20-23).

6. Excessive and expensive methods of collection were used, and the cost charged to policyholders (R. 18).

7. The basis of the assessment should have been the monthly incurred losses and profits (R. 27).

8. Unearned premiums were included in the estimate of losses as a liability of policyholders (R. 16).

9. Certain policyholders were not liable for ANY assessment, others for only a reduced, limited assessment, because of the variations in monthly losses and profits (R. 26).

10. The assessment on the basis of "earned" rather than "annual" premiums was a violation of the Articles, By-Laws, and the policies of the company (R. 19).

11. The record of the hearings preceding the December 23, 1938, order was necessary to proof res adjudicata, and determined approximately $250,000 of their assessment (R. 29).

12. Policyholders acted with due and reasonable dispatch on learning of the assessment order (R. 34-46).

D. These petitioners contend that the original failure to give notice amounted to a denial of due process as a judicial matter, and became, after refusal to grant a hearing, a taking of property without due process of law (*Hite* v. *Hite*, 124 Cal. 389, 57 P. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82).

E. The contention is also made that the question here presented is a novel one not squarely passed upon by this Court, and that it is a question of substantial Federal law which needs adjudication for the purpose not of this case alone but for liquidations to follow. In most cases adjudicated, the ruling has been on the requirements of due process for non-residents. The cases of *Christopher* v. *Brusselback*, 302 U. S. 500; *Hawkins* v. *Glenn*, 131 U. S. 319, and *Pink* v. *A. A. A. Highway Express, Inc.*, 314 U. S. 201, 207, approach, but do not control, the issues here involved. In the latter case, the decision is distinguished by (1) actual mail notice in conformity with the statute, (2) as applied to non-residents, and (3) apparently there was no restraining order against the officers of the company, as there was in this case (R. 3).

F. The questions of due process of law, of service, and of jurisdiction, were properly raised in the trial court in the briefs and in the record (R. 34, 39, 40-46). Petitioners further allege that the Federal questions were duly presented and properly raised according to the practice and the circumstances of this case, in the Supreme Court of Wisconsin. Questions of due process of law, of service, and of jurisdiction were duly raised in said court in the only manner allowed, viz., briefs filed and oral argument made. At the suggestion of the Supreme Court of Wisconsin during the oral argument, these petitioners confined themselves, in the brief to be printed and in oral argument, to the merits of the appeal on the November 29, 1941, order, reserving all questions on the two orders of May 26, 1942, and were therefore justified in expecting an opportunity to present such reserved matters prior to the said court's decision. Hence, the decision was a surprise ruling, especially unexpected and unforeseen in view of the previous

decisions of said court and particularly in view of said court's intimation, in *In Re Builders' Mutual Casualty Company Liquidation* (229 Wisconsin 365, 383), that "* * * We say no more upon this because of the fact that we are not dealing with the first assessment but with the second. The first assessment was levied upon precisely the same basis as was this. *Had the same objection been made then as is made here, it may very well be that this court might have been compelled to sustain it.*" (Emphasis supplied.)

A further reason for the surprise of the ruling was the failure of the court to make any change in its interpretation of changes made in the statute, which, modified, made a policyholder's liability only a "pro rata share of losses and expenses incurred".

Conclusion.

These petitioners feel that their attempts to secure a hearing and justice have resulted in a denial of their constitutional rights, in (1) the lack of a full and impartial hearing and trial, (2) the refusal of the Supreme Court of Wisconsin to order trial, and (3) in the Supreme Court's rendering of a decision on a limited record involving disputed points of fact.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Wisconsin, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 83, August Term, 1942, "In Re Liquidation of Wisconsin Mutual Insurance Company", Appeal of Herman A. Hinze, Carl E. Sturm, Endre A. Sharpee, et al., Appellants, v. Morvin Duel, Commissioner of Insurance, Respondent, and that the said judgment of

the Supreme Court of Wisconsin may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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SUPREME COURT OF THE UNITED STATES

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No. 862

HERMAN A. HINZE, CARL E. STURM, ENDRE A. SHARPEE, ET AL.

vs. *Petitioners,*

MORVIN DUEL, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE WISCONSIN MUTUAL INSURANCE COMPANY.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Court Below.

The opinion of the Supreme Court of the State of Wisconsin appears in the record pages 124 to 140, and is reported in 241 *Wisconsin* 394, and in 6 *Northwestern* (2) 330.

In the interest of brevity, no statement of the case as such is made herein except as it relates to the question of jurisdiction and argument on the case. A summary is made under the title "Summary of Actions in the State Courts" appearing in the annexed Petition.

Jurisdiction.

(A) This petition is filed pursuant to Section 237b of the Federal Judicial Code (28 U. S. C. A., 344 (b)) which provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it

for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; *or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution,* or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *." (Emphasis supplied.)

(B) Petitioners also rely on Rule 38 of the Rules of this Court, and particularly on Paragraph 5 thereof, which, in part, provides:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this court."

(C) Date of Judgment, and Date of Application for Appeal.

The date of the final decree of the Supreme Court of the State of Wisconsin, which is now sought to be reviewed, was November 10, 1942. Appellants' (petitioners here)

motion for rehearing was denied December 29, 1942. The time for taking the appeal began to run on the date of the denial of said motion for rehearing, to wit: December 29, 1942. (*Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31.)

This petition for writ of certiorari is filed within three months of said time, as provided by section 330, title 28, of the United States Code.

(D) Raising of the Questions In State Courts.

In addition to briefs filed by counsel in the Circuit Court for Dane County, the record shows that the questions of service and due process were emphasized in said proceedings.

In the order to show cause, heard below on April 24, 1942, (R. 34) the petitioner stated:

> "* * * that from his investigation of the facts and interviewing numerous policyholders, as well as from his own experience, the policyholders were not informed as to the basis of or the nature of the assessment made by the order of November 29, 1941; that an examination of the record in this case indicates that neither the petition nor the plan of assessment was ever served upon the insurance company, its officers or policyholders, the only service being by publication in the Wisconsin State Journal (Madison, Wis.) while policyholders affected to the extent of about 10,000, lived in all parts of the state * * *." (Parenthetical matter supplied.)

and further stated (R. 39):

> "* * * and of the failure of the Commissioner of Insurance to give adequate notice to the policyholders of the plan of assessment proposed by him * * *"

Approximately 44 affidavits were attached to said order to show cause, and were incorporated therein by reference

and made a part thereof, stating in substance (1) that the "First Notice of Assessment" (which in most cases was received during December, 1941, and January, 1942) was the first information that these affiants had of any assessment levied against them, and (2) that they did not read or see in any newspaper, including the *Wisconsin State Journal,* any published notice of the order to show cause which resulted in the assessment order of November 29, 1941, and (3) that they had no notice of any intention to assess, or of indication that they were liable to assessment (R. 43-46).

These contentions were further supported by the affidavits of five other policyholders (petitioners here), stating that they had talked to more than 600 policyholders (R. 40-43) living in all parts of the State of Wisconsin.

The same issues as to service, jurisdiction, and the denial of Constitutional rights were brought before the Supreme Court of the State of Wisconsin at the earliest opportunity (R. 142, 175-197). The purpose of the motion and brief for rehearing filed was to bring before the court the issues, including some of the federal questions involved, relating to the two orders of May 26, 1942, which had been deferred and reserved at the request of the court:

> "This motion is made necessary for the following reasons: First, because at the suggestion of the Court, at the time of the hearing, the questions which were raised in the two petitions of the appellants, heard on April 1st and April 24, in the court below, were reserved and were not ruled upon. These questions are of vital interest to the appellants." (R. 153, 154.)

The decision represented a surprise and was unexpected, in view of the court's request for deferment of the questions referred to above, and in addition was unforeseen in view of the previous decisions of said court as will be seen from

citations of authorities given in motion and brief (R. 141-209). The petitioners claimed, and had, a right to be heard on their Constitutional rights.

International Steel & Iron Co. v. *National Surety Co.*, 297 U. S. 657, 665;

Saunders v. *Shaw*, 244 U. S. 317, 320;

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 677, 678;

Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320.

Specification of Error.

First. The court erred in holding that "due notice thereof having been given" in the levy of this assessment, it was not in conflict with, and in violation of, the provisions of the 14th Amendment to the Constitution of the United States in that the State of Wisconsin, by and through the acts of its Commissioner of Insurance, assumes and seeks

(A) to deprive these petitioners, and certain other citizens of the United States and of the State of Wisconsin, of rights, privileges, and immunities secured to other citizens of the United States and of the said State;

(B) to deprive these petitioners and other citizens of the United States and of the State of Wisconsin, of liberty and property without due process of law; and

(C) to deprive and to deny these petitioners and certain citizens and persons within the jurisdiction of the State of Wisconsin, of the equal protection of the laws.

Second. The court erred in holding that these petitioners have no right to a trial on the assessment order, depriving them of liberty and property without due process of law, and depriving them of the equal protection of the laws.

Third. The court erred in holding that "provision for refund of such excess" does not deprive these petitioners of liberty and property without due process of law.

Fourth. The court erred in holding that the assessment as levied did not constitute an impairment of the obligation of contract, and was not in conflict with, and in violation of, Article I, Section 10, of the Constitution of the United States.

ARGUMENT.

I.

Failure to give proper notice and grant trial, is a substantial question of due process of law.

As restated in *Ex Parte Wall,* 107 U. S. 265, and *Cooley's Constitutional Limitations,* 353:

> " 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society'."

(A) No citation of authority is needed to illustrate that one of the most essential elements of due process of law is proper notice.

(B) Likewise, and as a part of the requirement of notice, an opportunity for hearing is one of the most essential elements of due process of law. These petitioners will be divested of their property unless allowed a hearing before an impartial tribunal, where they can contest the claims

set up against them and be allowed to meet them on the law and the facts.

Iron Cliffs Co. v. *Negaunee Iron Co.*, 197 U. S. 463, 49 L. Ed. 836, 25 S. Ct. 474;

Ames v. *Port Huron Log Driving & Boom Co.*, 11 Mich. 139, 83 Am. Dec. 731;

Stuart v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

American Jurisprudence, Constitutional Law, Vol. 12. "When the right to a hearing is denied, the mere giving of a notice is ineffectual for any purpose within the meaning of the constitutional guaranty. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. For example, ordering one to pay alimony without having had his day in court and without a hearing on the question of the marriage, when that is denied, amounts to a taking of his property without due process of law. Again, a forfeiture without notice to the owner of property and without opportunity of being heard on the question of his culpability has also been held to amount to the denial of due process of law."

Citations: *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914;

Hite v. *Hite*, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, 71 Am. St. Rep. 82.

II.

Failure to give notice as required in special proceedings is a denial of equal protection of the laws and lacks due process—This is a special proceeding requiring strict compliance with the law.

Substituted service and service by publication were unknown to the common law and depend upon statutory authorization, and there must be a strict compliance with the law.

We find that this was not done, as shown by quotations from section 262.14 of the Wisconsin Statutes, reading as follows:

> "Service by publication in special proceedings: *Service by publication of any process or notice in any special proceeding, except probate proceedings, may be made when the plaintiff is unable with due diligence to make service of such process or notice upon the defendant or party upon whom such service is required.* Such publication and proof thereof shall be made as required by Section 262.13." (Emphasis supplied.)

Section 262.13 provides as follows:

> "Publication or service outside state; proof of grounds; mode of service:
>
> "(1) Before entering judgment against any defendant who has been served with summons by publication or personally without the state pursuant to Rule 262.12 and who has not appeared, *the Court shall require proof by affidavit* or other evidence to be made and filed of the non-residence of the defendant where not shown by the verified complaint *and of the existence of any other fact not shown by the verified complaint and necessary to authorize service to be made by publication and that the service was in fact made as the rule requires.* The court may require additional proof. Said proof shall be conclusive in all collateral actions and proceedings.
>
> "(2) Service of the summons by publication shall consist of its publication in a newspaper *likely to give notice* to the defendant, to be published once a week for three weeks and in case the defendant's post-office address is known or can be ascertained, *by mailing him a copy of summons and complaint,* or a notice of the object of the action, as the case may require. The

mailing may be omitted if the post-office address cannot be ascertained."

The Supreme Court of Wisconsin itself has defined this to be a special proceeding (R. 126). See also *Wisconsin Statutes,* section 260.02; *Cornish* v. *Milwaukee & Lake Winnebago Railway Co.,* 60 Wis. 476; *People* v. *San Luis Obispo Bank,* 152 Cal. 261, 92 Pac. 481.

The Commissioner of Insurance did not (1) file proof by affidavit or other evidence to authorize service by publication; (2) publish in newspapers "likely to give notice" to policyholders living in all parts of the State; and he and his department had possession of records containing addresses of such policyholders, as evidenced by the fact that Yaudes testified (R. 61) that there were a definite number of policyholders (9500) and a definite number of policies (15000), and by the fact that policyholders were notified by mail (by the insurance department) of the amount of their assessments (R. 32-33).

III.

Substantiality of Questions Involved.

An analysis of the cases which have come before this Court indicate that the precise question here involved has not before been presented. The cases deal mostly with non-residents on a question of substituted service or notice by publication, and are distinguished in almost all cases from the present one by the fact that mail service WAS made and actual notice given. We have no challenge respecting decisions such as *Hawkins* v. *Glenn,* 131 U. S. 319, in which it was held that where a company was lawfully sued by its corporate name, "the individual stockholders were not proper parties to such a suit, the president and the directors being, by their selection, their representatives for

this purpose." That case is distinguished from the present one, in that the corporation and its officers continued in that case to represent the corporation even after the trustee was appointed, because under the statute there involved, the corporation could sue and be sued as before for the purpose of collecting debts due it and enforcing liabilities against it. Such is not true in the present case.

In addition, the corporation and officers of the Wisconsin Mutual Insurance Company were not summoned into court (R. 8), and in fact, were restrained by the terms of the order from taking any part (R. 3):

> "6. It is further ordered that the said Wisconsin Mutual Insurance Company of Madison, Dane County, Wisconsin, its officers and agents, be and they *thereby are enjoined and restrained from exercising any of the corporate rights or privileges of said company,* from collecting any of its debts, claims, or demands, or paying out any of its moneys, or transferring or disposing of any of its assets, *or interfering with the liquidation of said company by the aforesaid Commissioner of Insurance.*" (Emphasis supplied.)

In order that there be a judicial determination which would bind the policyholders, the corporation and its officers must have been served.

It was held in *Christopher* v. *Brusselback,* 302 U. S. 500, as follows:

> "In the present case no such warning has been given, for no such procedure has been prescribed. The statutes have fixed only the conditions on which liability of the stockholders is to attach, leaving to creditors as their only recourse the usual procedure of courts as the means of asserting the liability. There is nothing in the statute relating to the organization of Federal Land Banks and the imposition of the stockholders' liability to suggest that by virtue of their

membership in the corporation the stockholders *can be said to have subjected themselves to a procedure of determining* IN THEIR ABSENCE *the essential conditions of liability, or to have relinquished their right to contest, as in any other litigation, every step essential to its establishment.* As we cannot say that petitioners' membership in the bank was conditioned upon their surrender of the benefits of a procedure which would otherwise be required, there is no basis for a court to dispense with it more than in other cases in which a personal judgment is sought." (Emphasis supplied.)

In view of the restraining order in the present case, against the corporation and its officers, it is pure legal fiction to say that after that date the policyholders were, or could be, represented by the corporation. This is an entirely different situation from that in *Hawkins* v. *Glenn, supra,* where the corporation as such continued to function. It appears from the record (R. 8) that after the restraining order of February 5, 1941, the officers of the corporation ceased to function, and took no further part in the proceedings. They were stripped of their authority to represent the policyholders. If, however, they could still represent policyholders, it still follows that the corporation and its officers were entitled to notice of the proceedings at which the assessment was ordered. This was not done in this case (R. 17). The fact that a corporation is served with a summons in foreclosure proceedings would certainly not justify the appointment of a receiver during the course of the foreclosure without notice to the corporation. Similarly, an order for the payment of alimony or for an injunction in an action commenced by service of process, would have no validity if the order to show cause upon which such injunction was based, was not served upon the party to be bound. Due process required that service be made.

In the following cases it will be noted that actual mail notice was given, according to statute, by mail notice:

Pink v. *A.A.A. Highway Express, Inc.*, 314 U. S. 201, 204;

Selig v. *Hamilton*, 234 U. S. 652;

Chandler v. *Peketz*, 297 U. S. 609.

For these reasons, the petition presents a substantial Federal question.

Senn v. *Tile Layers' Protective Union*, 301 U. S. 468.

In summary, "policyholders cannot be deemed to have been represented by the corporation or its officers who had been effectively enjoined from exercising any corporate powers, and failure to serve notice of the hearing upon the corporation and its officers eliminates any claim that they were the representatives of the policyholders in the present proceedings" (R. 191).

Conclusion.

Wherefore, it is respectfully submitted that this petition for certiorari should be granted.

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(10)

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CLERK

Supreme Court of the United States

OCTOBER TERM 1942

No. 862

HERMAN A. HINZE, CARL E. STURM, ENDRE A. SHARPEE, ET AL.,

Petitioners,

v.

MORVIN DUEL, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE WISCONSIN MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioners,

v.

MORVIN DUEL, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE WISCONSIN MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners seek a writ of certiorari to review the action of the Supreme Court of Wisconsin in affirming three orders of the Circuit Court for Dane County, Wisconsin, made in the course of the liquidation of the Wisconsin Mutual Insurance Company.

Petitioners have filed with the clerk of this court copies of their brief in support of their motion for rehearing in the Wisconsin Supreme Court, and have caused a copy of such brief to be inserted in the printed Record, pages 143-209.

In view of petitioners' references to their brief on rehearing in the court below, respondent is filing herewith, at the suggestion of the clerk of this court, nine copies of its briefs filed with the Wisconsin Supreme Court, and likewise a single copy (no more being available) of appellants' brief and appellants' reply brief, as filed in that court, in order that there may be a clear understanding of the questions presented to and decided by the court below.

Statement

The facts are fully set forth in the "Statement of Facts" by Chief Justice Rosenberry in the decision reported in 241 Wis. 394, 6 N. W. (2d) 330 (Record, pp. 127–130), and may be summarized as follows:

The order for liquidation.

On the petition of Morvin Duel, Commissioner of Insurance of the State of Wisconsin, to the Circuit Court for Dane County, Wisconsin, after due service on the Wisconsin Mutual Insurance Company of an order to show cause why it should not be liquidated, and after hearings at which it was represented by its officers, agents and attorneys, the Circuit Court entered an order, dated February 5, 1941, pursuant to Sec. 200.08, Wis. Stats. (see Appendix hereof), directing that the Company be liquidated forthwith under the direction of the Commissioner (Record, pp. 2–4, 127–128).

The assessment order of November 29, 1941.

On October 18, 1941, the Commissioner filed a petition in the liquidation proceeding setting forth the necessity for an assessment on the 9,500 policyholders (Record, pp. 4–7, 128), and, after the publication of a notice prescribed by the court (Record, pp. 8, 9) for three weeks in the official State paper (Sec. 35.63,

Wis. Stats.), and after hearings, at which certain policyholders, including the petitioner, Herman A. Hinze, appeared in person and by attorneys, the Circuit Court entered the assessment order dated November 29, 1941 directing the making of an assessment on the policyholders of the Company (Record, pp. 8–14, 128–129).

Petitioners' first motion to set aside the assessment order.

On February 28, 1942 the petitioners, Sturm and Hinze, moved the Circuit Court to set aside the order of November 29, 1941 and obtained an order to show cause returnable April 1, 1942 why the order of November 29, 1941 should not be set aside on the ground that it was excessive, illegal and inequitable (Record, pp. 14–31, 129).

At the hearing on April 1, 1942, the Commissioner opposed the motion on the merits and also raised the question of the jurisdiction of the Circuit Court to review the assessment order, since Sec. 252.10 (1), Wis. Stats., (see Appendix hereto) prohibits review after the expiration of sixty days from the end of the term at which the order was made, which period had expired. The motion was taken under advisement by the circuit judge (Record, pp. 129–130).

Petitioners' second motion to set aside the assessment order.

On April 21, 1942, the appellants, Sharpee et al., moved the Circuit Court (Record, p. 39), to reopen the proceedings and to set aside the assessment order, pursuant to Sec. 269.46, Wis. Stats., (see Appendix hereto) providing for relief from orders or proceedings obtained against a party "through his mistake, inadvertence, surprise or excusable neglect,". That motion was heard on April 24, 1942, and was taken under advisement by the circuit judge (Record, p. 130).

Orders denying motions to set aside the assessment order.

On May 26, 1942, the Circuit Court entered orders denying both the Sturm and Hinze motion and the Sharpee motion. The orders recited that no cause had been shown warranting the setting aside or modifying of the assessment order, and that such order and the assessment made thereby were reasonable, legal and equitable (Record, p. 130).

The order denying the Sturm and Hinze motion also recited that the motion had not been brought on for hearing within the sixty day period limited by Sec. 252.10 (1), Wis. Stats. (Record, p. 130).

And the order denying the Sharpee motion also recited that no cause had been shown warranting relief on the ground of mistake, inadvertence, surprise or excusable neglect (Record, p. 130).

Appeal to Wisconsin Supreme Court.

Sturm and Hinze, as well as Sharpee et al., appealed to the Wisconsin Supreme Court from all three orders, but did not print in their case or brief either of the orders of May 26, 1942 (Record, p. 56), and their counsel made no argument in their brief or orally to show that such orders were erroneous, asserting merely that consideration of the validity of such orders was postponed because "we are not certain what position counsel will take with respect to the effect of the court's conflicting conclusions" (original Brief of Appellants in Wisconsin Supreme Court, p. 78).

The Commissioner's brief as respondent in the Wisconsin Supreme Court (p. 80) pointed out that appellants had apparently abandoned their appeal from the orders of May 26, 1942; also that the order denying the Sturm and Hinze motion was properly entered because the motion had not been seasonably brought on for hearing before the Circuit Court (Brief, p. 81);

and likewise that the order denying the Sharpee motion was proper because no mistake, inadvertence, surprise or excusable neglect had been shown (Brief, pp. 82–86).

Decision of Wisconsin Supreme Court.

On the oral argument before the Wisconsin Supreme Court, appellants asked and obtained leave to file a reply brief, which again made no attack on the orders of May 26, 1942 (Appellants' reply brief in Wisconsin Supreme Court, pp. 1–57).

However, the Supreme Court of Wisconsin considered and decided every question raised by appellants whether arising under the assessment order of November 29, 1941 or under the orders of May 26, 1942, the opinion of the court opening with the statement:

> "We shall take up consideration of the questions for decision in the order in which they are presented in the briefs of counsel." (Record, p. 130)

Motion for rehearing before Wisconsin Supreme Court.

Appellants moved the Wisconsin Supreme Court for a rehearing, and their brief in support thereof for the first time raised the question that the assessment order of November 29, 1941, denied due process (Brief, p. 23).

The Commissioner's brief on the motion for rehearing (pp. 6–7) pointed out that the question of denial of due process (the asserted lack of due notice of the assessment order) had not been seasonably raised, so that the court would be justified in refusing to consider such question on the motion for rehearing.

The Wisconsin Supreme Court on December 29, 1942, denied the motion for rehearing without opinion (Record, p. 210).

ARGUMENT

I. The writ of certiorari should be denied because the record fails to show that a federal question was raised and decided adversely.

The only place in the printed record where there is any showing that any Federal question was raised in the court below is in "Appellants' Brief In Support Of Motion For Rehearing" (printed Record, pp. 143–209), which brief is not properly a part of the record.

Zadig v. Baldwin, 166 U. S. 485, 488; 41 L. Ed. 1087, 1088.

Mut. Life Ins. Co. v. McGrew, 188 U. S. 291, 308; 47 L. Ed. 480, 485.

Hon. Arthur A. McLeod, the clerk of the Wisconsin Supreme Court, advises that "Appellants' Brief In Support Of Motion For Rehearing" was not part of the record certified by him.

While such brief was inserted in the record as printed, at the request of petitioners' counsel, as the Clerk of this Court has advised, it should not be considered a part of the record before this court, since it was not a part of the record in the Wisconsin Supreme Court and was not certified as such by the Clerk of that court.

As stated above, in the absence of such brief on rehearing, there is nothing in the record to show that a Federal question was raised below and decided adversely. Consequently the petition for the writ of certiorari should be denied.

Lynch v. New York, 293 U. S. 52, 54; 79 L. Ed. 191, 193.
Honeyman v. Hanan, 300 U. S. 14, 18; 81 L. Ed. 476, 479.

The denial of the motion for rehearing by the Wisconsin Supreme Court may well have been made on non-federal grounds.

As regards the assessment order of November 29, 1941, the motion for rehearing might well have been denied on the ground that the attack on it as lacking due process came too late, i.e. had not been raised in either appellants' original or reply briefs (see pp. 8–11 hereof). In addition, such motion could also have been denied on the ground that petitioners' general appearance by moving to set aside the assessment order on grounds going to its merits constituted a general appearance which waived the alleged failure to make personal service of notice on petitioners (see p. 16 hereof).

As regards the orders of May 26, 1942 which denied petitioners' motions to set aside the assessment order, the motion for rehearing may well have been denied on the ground that the attack on those orders came too late since no attack on them was made in either petitioners' original or reply briefs (see pp. 18–19 hereof). Likewise, such motion could also have been denied on the ground that the assessment order was reasonable, legal and equitable, and on the ground that the Sturm and Hinze motion was not brought on for hearing within the time limited by Section 252.10, Wis. Stats. (see p. 20 hereof), and that no mistake, inadvertence, surprise or excusable neglect had been shown to warrant the granting of the Sharpee motion (see p. 20 hereof).

In short, no decision of a Federal question by the Wisconsin Supreme Court "was necessary to the determination of the cause".

Honeyman v. Hanan, 300 U. S. 14, 18; 81 L. ed. 476, 479.

II. The writ of certiorari should be denied because the federal claim was not seasonably made in the state court.

The claim that the assessment order was void under the due process clause of the Fourteenth Amendment was not seasonably made below since the question was first raised on motion for rehearing.

American Surety Co. v. Baldwin, 287 U. S. 156, 163–164; 77 L. ed. 231, 236.

Herndon v. Georgia, 295 U. S. 441, 443; 79 L. ed. 1530, 1532.

In *Herndon v. Georgia,* the court said:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. * * *
>
> "Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. * * * The whole point, therefore, is whether the ruling here assailed should have been anticipated." (295 U. S. 443–444; 79 L. ed. 1532–1533)

The instant case is not within the exception noted in the above quotation, i.e. one where the Federal claim arose from an unanticipated disposition of the appeal in the court below.

While the brief of appellants (petitioners here) in support of their motion for rehearing in the Wisconsin Supreme Court stated that the point—that the assessment was void because of lack of

service—"was urged both in the Circuit Court and before this court" (Rehearing brief, p. 23, Record, p. 175), the fact is that such point had not been previously "urged" in the Wisconsin Supreme Court, since "the only mention of it in appellants' main or reply briefs is in the statement of facts on pages 8 and 13 of their main brief, in which there is no suggestion that the order was invalid on account of insufficient notice" (Respondent's Brief on Rehearing, below, p. 6), and likewise no claim that the order lacked due process.

Consequently, the "long established general rule" applies, i.e. "that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

> *Herndon v. Georgia,* 295 U. S. 441–443; 79 L. ed. 1530–1532.

The record fails to show that the Wisconsin Supreme Court entertained or decided the Federal question in denying the motion for rehearing (Record, p. 210).

Failure to raise the Federal question except in petitioners' brief on motion for rehearing is not excusable on the ground of surprise.

Petitioners claim "surprise" only as regards the decision affirming the two orders of the Circuit Court dated May 26, 1942, but the question of lack of due process does not arise in connection with those orders but only in connection with the making of the assessment order of November 29, 1941. There neither is nor could be any claim that there was any lack of due process in connection with the making of the orders of May 26, 1942, for petitioners made and filed the motions resulting in those orders, and appeared in person and by their attorneys at the hearings on such motions (see Appendix A and B to Brief for Respondent before Wisconsin Supreme Court).

If want of personal service on the policyholders is an infirmity, that infirmity inhered in the assessment order itself, and was before the court on the appeal from that order, so that the petitioners had full opportunity to raise and argue the point without regard to the appeal from the orders of May 26, 1942.

It is thus clear that the asserted question of lack of due process arose only in connection with the making of the assessment order of November 29, 1941, and was thus presented by the appeal from that order, and could and should have been raised in connection with that appeal.

This becomes definitely clear from petitioners' brief on rehearing in the court below. Pages 23–45 of that brief are devoted to an argument respecting the lack of notice of the making of the assessment order of November 29, 1941, under the heading:

> "Order Of November 29, 1941, Null And Without Jurisdiction Because No Proper Service Made" (Brief, p. 23)

The following 22 pages of that brief on rehearing are devoted to the argument that the notice given to policyholders by publication was insufficient to give the Circuit Court jurisdiction to make the assessment order (Brief, pp. 25–41), and to the argument that petitioners' general appearance had not waived the right to assert the invalidity of the order on that ground (Brief, pp. 41–45).

In all these 22 pages of argument, the only mention of the orders of May 26, 1942 is a quotation (p. 23) from the Sharpee motion in Circuit Court which merely sets forth that the only service of notice of the proposed assessment order was by publication in the Wisconsin State Journal (Record, pp. 34–35).

The Commissioners' brief on the motion for rehearing (pp. 6–7) pointed out that the question of denial of due process had not been seasonably raised, so that the court would be justified in refusing to consider it on the motion for rehearing.

So, it is entirely clear that any possible question of due process was directly involved on the appeal from the assessment order of November 29, 1941, and could have been raised by petitioners on the original submission of the cause to the Wisconsin Supreme Court in their original or reply briefs before the Wisconsin Supreme Court.

It follows that "surprise", if any there was, at the affirmance of the orders of May 26, 1942 had nothing to do with petitioners' failure to present the question of alleged lack of due process in their original or reply briefs, in connection with their appeal from the assessment order of November 29, 1941.

Furthermore, there could have been no "surprise" at the affirmance by the Wisconsin Supreme Court of the Circuit Court orders of May 26, 1942 (see pp. 8–9 of this brief).

III. The decision of the Wisconsin Supreme Court in affirming the assessment order of November 29, 1941 did not deny any right under the United States constitution.

Petitioners assert that "the action of the Insurance Commissioner and the judgment of the Supreme Court of the State of Wisconsin, in levying an assessment without personal service and without mail notice and without 'service by publication in special proceedings', contravene the Fourteenth Amendment" (Petition for Certiorari, p. 5).

1. The notice given to policyholders by publication was proper and sufficient.

The published notice given to policyholders is the accepted method and the only practical way of giving notice to a large number of policyholders—in this case some 9,500 (Record, p. 61).

The original Articles of the Wisconsin Mutual Insurance Company provided:

"Every person, corporation, association or partnership insured in this corporation shall be a member thereof * * *." (Record, p. 84)

Like provisions were contained in the Amended Articles and in its By-laws (Record, pp. 85, 86), and in its policies of insurance (Record, pp. 86, 87, 88).

Likewise, the Articles, By-laws and policies provided, as required by sec. 201.02 (3) Wis. Stats., that policyholders and members should be liable to assessment "to an amount equal, and in addition to the annual premium stated in the policy" (Record, pp. 85, 86, 87, 88).

Consequently, petitioners by becoming policyholders and members of the Company subjected themselves to assessment by the Commissioner in case of liquidation of the Company pursuant to secs. 200.08, 200.09, and 220.08, Wis. Stats. (see Appendix hereof).

Service of the order to show cause for the liquidation of the Company was duly made on the Wisconsin Mutual Insurance Company, and it was represented at the hearings resulting in the liquidation order of February 5, 1941 by its officers, agents and attorneys (Record, pp. 127–128). The liquidation order directed the Company, its officers and agents to turn over to the Commissioner all of its assets and enjoined them from exercising any rights or privileges of the Company (Record, p. 3), and that "this matter be held by the Court for the entering of such further orders or the giving of such further directions as may be necessary from time to time in the liquidation of the business of said Company" (Record, p. 4).

Pursuant to the provisions of the statutes and the terms of the liquidation order, the Commissioner applied to the Circuit Court on October 18, 1941 for the assessment order, and the court fixed a date for hearing and directed that notice thereof be given to the members and policyholders by publication of a notice in the official state paper, the Wisconsin State Journal (sec. 35.63 Wis.

Stats.), a daily newspaper of general circulation published in the City of Madison, Wisconsin, once in each week for three consecutive weeks prior to the date of hearing (Record, p. 8).

The prescribed notice was published and certain members and policyholders, including the petitioner Hinze, appeared in person and by attorneys, and obtained a seventeen day adjournment. On the adjourned date certain policyholders, again including the petitioner Hinze, appeared in person and by attorneys and participated in the hearing which resulted in the assessment order of November 29, 1941 (Record, pp. 8–10, 128).

This procedure followed the accepted practice approved by the Wisconsin Supreme Court, and was, obviously, the only practicable method of giving notice to the 9,500 policyholders (Record, p. 61).

Application of Whitman, 186 Wis. 434, 436.

In re Builders Mut. Cas. Co., 229 Wis. 365; (see Vol. 2107, Cases and Briefs, Case p. 21, Wisconsin State Law Library, containing the record in the case).

In re Liquidation of Wisconsin Mutual Insurance Co., 241 Wis. 394, 6 N. W. (2d) 330 (Record, pp. 127–130).

In the Wisconsin Mutual case the Wisconsin Supreme Court said:

> "The order (i.e. the order to show cause for the assessment) came on for hearing on November 10, 1941, *due notice thereof having been given.*" (241 Wis. 399; 6 N. W. (2d) 332, (Record, p. 128)

In *Pink v. A. A. A. Highway Express, Inc.,* 314 U. S. 201, 207, the court said:

> "It is a familiar rule that those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity to the statutes of the state of its organization, although they are not made parties to the proceeding for levying it. * * * Whether we support these legal consequences by reference to consent of the stock-

> holder or to his assumption of a corporate relationship subject to the regulatory power of the state of incorporation, in either case the procedure conforms to accepted principles, *involves no want of due process,* and is entitled to full faith and credit so far as the necessity and amount of the assessment are concerned. See *Christopher v. Brusselback,* 302 U. S. 500, 82 L. ed. 388, 58 S. Ct. 350, and cases cited. The like principle has been consistently applied to mutual insurance associations, where the fact that the policyholders were members was not contested."
>
> *Pink v. A. A. A. Highway Express, Inc.,* 314 U. S. 201, 207, 86 L. ed. 152, 156–157.

The case of *Christopher v. Brusselback,* 302 U. S. 500, cited by counsel as showing that the assessment order lacks due process of law (Brief, p. 24), in fact holds the exact contrary, for the case is cited in the *Pink* case as authority for the above-quoted rule. Such rule was held inapplicable in the *Christopher* case for the reason that the Federal Farm Loan Act, under which the Joint Stock Land Bank was organized, did "not confer upon the Federal Farm Loan Board any power to levy an assessment on the stockholders, or give to the receiver authority to maintain suit for the enforcement of their statutory liability, or otherwise set up any machinery comparable to that of the National Banking Act for enforcing the stockholders' liability" (302 U. S. 502).

In the instant case Sections 200.08 and 200.09, Wis. Stats., making applicable the provisions of Section 220.08 (see Appendix hereto), expressly confer upon the Commissioner of Insurance the power to levy and collect assessments, etc.

The requirements of "due process," were thus satisfied by the published notice, and by the appearance of the corporation in the liquidation proceedings pursuant to due service on it of the order to show cause for its liquidation.

There was no point or necessity in serving notice of the motion for the assessment order on the Company, other than by publication, for its interests as a corporation were not involved, and

personal service of such notice on a company in liquidation would be a useless formality. As pointed out in petitioners' brief (p. 25), the corporation was at the time practically defunct and could take no action except under the direction of the court. Consequently there was no necessity or reason for giving the corporation personal notice of the motion for the assessment order. Its presence in the proceedings was sufficient to give the court jurisdiction to do everything necessary for its liquidation, including the making of an assessment order upon such notice to policyholders as the court considered desirable and practicable.

Such is the established rule in Wisconsin and elsewhere.

Parker v. Stoughton Mill Co., 91 Wis. 174, 181.

Application of Whitman, 186 Wis. 434, 438.

6 *Fletcher Cyc. Corp.*, p. 7090, sec. 4120.

7 *Fletcher Cyc. Corp.*, pp. 7374–7376, 7422, secs. 4223, 4237.

Notes, 48 A. L. R. 669, 674; 97 A. L. R. 690.

32 *Corpus Juris*, sec. 110, p. 1044.

Bernheimer v. Converse, 206 U. S. 516, 532.

Converse v. Hamilton, 224 U. S. 243, 257.

Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201, 207.

An assessment against policyholders, made on notice by publication, is binding as to the propriety, amount and method of assessment, in a suit against the policyholder to collect the assessment against him.

Taggart v. Wachter, 21 Atl. 2d 141, 148 (Md.).

Pink v. Town Taxi, 21 Atl. 2d 656, 658 (Me.).

23 *Harvard Law Review* 44.

2. Section 262.14, Wis. Stats., has no application to liquidation proceedings under Section 200.08, Wis. Stats.

Petitioners here (appellants below) argued this point in their brief on rehearing before the Wisconsin Supreme Court (pp. 25–28), the same as it is argued here (Petitioners' brief, pp. 21–23), and the Wisconsin Supreme Court in denying the motion for rehearing necessarily ruled that Section 262.14, Wis. Stats., had no application to this liquidation proceeding.

The question as to compliance with Section 262.14, Wis. Stats., is obviously not a Federal question but purely a question of State law, on which the decision of the Wisconsin Supreme Court is conclusive.

Ward & Gow v. Krinsky, 259 U. S. 503, 510; 66 L. ed. 1033, 1036.

3. The point of lack of notice of the assessment order was waived by petitioners (appellants below).

The motions of petitioners (appellants below) of February 28 and April 21, 1942, to set aside the order of November 29, 1941 on grounds going to the merits of the order, constituted a general appearance which waived any possible deficiency in giving notice of the application for the order.

Farmington Mutual Fire Ins. Co. v. Gerhardt, 216 Wis. 457, 461–462.

Schwantz v. Morris, 219 Wis. 404, 409–412.

Evans v. Orgel, 221 Wis. 152, 154, 155.

The above cases rule that even if the assessment order had been entered *ex parte,* without any notice at all (221 Wis. 153), the general appearance of appellants (petitioners here) on their motions to set aside the order and open up the proceedings was a waiver of the defect, if any.

As has been said by the Wisconsin Supreme court, "a defendant cannot be allowed to assert that the court is without proper jurisdiction over him and at the same time ask the same court for other relief which could only be granted by a court having proper jurisdiction."

Simon v. de Gersdorff, 166 Wis. 170, 174.

Furthermore, the appeal from the assessment order of November 29, 1941, constituted a general appearance so that petitioners (appellants below) cannot be heard to object that the notice of application therefor was insufficient.

Schwantz v. Morris, 219 Wis. 404, 413.

Having had the assessment order reviewed on its merits, appellants below (petitioners here) could not assert that it was void for want of personal jurisdiction over them.

4. The Supreme Court of Wisconsin overruled all petitioners' contentions with reference to the merits of the assessment order.

The petitioners set forth in their petition for certiorari (pp. 9–10) their contentions (all non-federal questions) with reference to the merits of the assessment order. No argument is made thereon, probably for the reason that all of such contentions were presented at length in their briefs as appellants before the Wisconsin Supreme Court, and were considered by that court and overruled (Record, pp. 130–140).

IV. The decision of the Wisconsin Supreme Court in affirming the circuit court orders of May 26, 1942 did not deny any right under the United States constitution.

These orders denied petitioners' motions to set aside the assessment order of November 29, 1941.

Petitioners assert in their petition for certiorari that the Supreme Court of Wisconsin requested on the oral argument that

petitioners (appellants below) confine their argument to the assessment order of November 29, 1941, "with the right later to submit questions on the two orders (May 26, 1942) of the lower court" (Petition for certiorari, p. 4).

The above is not an entirely accurate statement of what took place, for the Court merely suggested that, in view of the direct appeal from the assessment order, it was not necessary to discuss the Circuit Court orders refusing to set aside the assessment order. Thus, the Wisconsin Supreme Court said in its opinion:

> "The orders appealed from which denied the motions made by appellants to set aside the order of November 29, 1941, should be affirmed. That order being here upon the merits and being affirmed by this Court, no further consideration need be given to the orders of May 26, 1942.
>
> "As the trial court held, 'no cause has been shown warranting relief on the ground of mistake, inadvertence, surprise or excusable neglect.'" (Record, p. 139)

The facts are:

(1) Appellants did not, on their appeal to the Wisconsin Supreme Court, print in their Case or Brief either of the orders of May 26, 1942 (Record, p. 56), and made no argument in their brief to show that such orders were erroneous, but merely asserted that consideration of the validity of such orders was postponed because appellants were "not certain what position counsel will take with respect to the court's conflicting conclusions" (Appellants' brief below, p. 78).

(2) The Commissioner's brief as respondent pointed out that the orders should be affirmed because appellants had apparently abandoned their appeal therefrom, and in any event that both orders should be affirmed on the merits (Respondent's brief below, p. 80).

The Commissioner's brief also pointed out that the order denying the Sturm and Hinze motion should be affirmed, because not brought on for hearing before the Circuit Court within the sixty

day period prescribed by Section 252.10 (1), Wis. Stats. (Respondent's brief below, pp. 81, 82); and that the order denying the Sharpee motion should be affirmed because no "mistake, inadvertence, surprise and excusable neglect" (Sec. 269.46, Wis. Stats.), on which the motion was grounded, had been shown (Brief of respondent below, pp. 82–86).

(3) Appellants' reply brief made no mention of the orders of May 26, 1942, nor any argument to show their invalidity, and likewise made no reply to the arguments in the Commissioner's brief to the effect that such orders were valid and that the appeal therefrom had been abandoned.

Consequently, the affirmance of those orders involved no denial of due process, since the question of such denial was not presented to the Wisconsin Supreme Court. Even the brief in support of the motion for rehearing made no attack on the validity of these orders of May 26, 1942.

Furthermore, the affirmance of the orders of May 26, 1942 could properly have been made, as it undoubtedly was, for the reasons set forth in the orders of the Circuit Court (Record, p. 130), i.e. that the assessment order was reasonable, legal and equitable; that the order denying the Sturm and Hinze motion had not been brought on for hearing within the time limited by Section 252.10 (1), Wis. Stats.; and that the order denying the Sharpee motion was correct because there was no showing of mistake, etc., as the court in fact squarely held (Record, p. 139).

Petitioners further assert that they have been deprived of a hearing and the opportunity to present testimony in connection with the making of the assessment order. This argument is obviously specious for the following reasons:

(1) The assessment order was properly made on published notice, after a hearing in which various policyholders, including the petitioner Hinze, and their attorneys participated (Record, pp. 9, 128).

(2) The order denying the motion of petitioners, Sturm and Hinze, was properly and necessarily affirmed because the matter was not brought before the Circuit Court until its jurisdiction to act had expired under Section 252.10, Wis. Stats. (Record, p. 130).

(3) The order denying the motion of the petitioners, Sharpee et al., was properly affirmed because no mistake, etc. had been shown (Record, p. 130).

(4) The two orders of May 26, 1942 were properly affirmed by the Supreme Court because such orders were, as above shown, properly and validly made, and also because the appeal therefrom had been abandoned and waived and no argument was made in the Wisconsin Supreme Court to show their invalidity.

Furthermore, petitioners never made any offer of any evidence other than a certified copy of certain liquidation proceedings of December 1938, which copy was received in evidence (Record, pp. 46–51).

All policyholders were given opportunity to participate in the hearings preceding the entry of the assessment order, and the petitioner Hinze did so participate (Record, pp. 82–83), as did Mr. Forkner, the attorney for petitioners (Record, pp. 76–77), as well as attorneys for other policyholders (Record, pp. 57, 58, 74, 75, 77, 79, 80).

V. The refund provision of the assessment order did not deny due process of law.

The petition for certiorari (pp. 6–7) suggests the question that the assessment order of November 29, 1941 denied due process because the Supreme Court of Wisconsin held that if the assessment proved excessive, refund of the excess might be made (Record, pp. 131, 134–135).

However, petitioners' brief makes no argument on this question other than again merely suggesting it (Brief, p. 20).

Consequently no argument on the part of respondent seems necessary other than to point out that the question was fully presented to the Wisconsin Supreme Court (Commissioner's brief before Wisconsin Supreme Court, pp. 14–17).

VI. The assessment order does not constitute an impairment of the obligation of contract.

The petition for certiorari (p. 7) suggests the question that the assessment constitutes an impairment of the obligation of contract under Article I, Section 10, of the Constitution of the United States.

However, no argument is made on this point in petitioners' brief other than the bare assertion on page 20 that the court erred in holding that the assessment did not constitute an impairment of the obligation of contract.

Consequently no argument is here made on this question.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Wisconsin Statutes

Section 200.08

"200.08 *Insolvent or delinquent companies; proceedings against.* (1) When any domestic insurance company * * * is insolvent * * * or is found to be in condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public, * * * the commissioner may apply by verified petition to the circuit court * * * and the court may make an order directing the company or society to show cause why the commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interest of its policyholders, creditors, stockholders and the public may require.

* * *

"(4) If, * * * the court shall order the liquidation of the business of such corporation, such liquidation shall be made by and under the direction of the commissioner, who may deal with the property and business of such company or society in his name as commissioner or in the name of the company or society, as the court may direct. * * *."

* * *

"(6) To carry out the purposes of this section, the commissioner shall have power, subject to the approval of the court, to make and prescribe such rules and regulations as to him shall seem proper."

Section 200.09

"200.09 *Insolvency; powers of commissioner.* All the powers and authority conferred upon the banking commission by section

220.08 and any amendment thereto, are hereby conferred upon and extended to the commissioner of insurance as to all insurance companies and fraternal or mutual benefit societies."

Section 220.08

"220.08 *Delinquent banks, commission may take possession.* * * *

"(3) Upon taking possession of the property and business of such bank or banking corporation, the commission * * * may, if necessary to pay the debts of such corporation, enforce individual liability of stockholders."

Section 252.10

"252.10 *Review of judgments and orders; unfinished business goes to next term; opening court; attendance of officers, pay.* (1) All judgments and court orders may be reviewed by the court at any time within sixty days from service of notice of entry thereof, but not later than sixty days after the end of the term of entry thereof."

Section 269.46

"269.46 *Relief from judgments, orders and stipulations.* (1) The court may, upon notice and just terms, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him obtained, through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding."

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(11)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 862

HERMAN A. HINZE, CARL E. STURM, ENDRE A. SHARPEE, ET AL.,

Petitioners,

vs.

MORVIN DUEL, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE WISCONSIN MUTUAL INSURANCE COMPANY.

REPLY BRIEF OF PETITIONERS

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SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF OF PETITIONERS

PRELIMINARY STATEMENT

This reply brief is necessary to correct some of the erroneous impressions which may have been created by Respondent's brief. In the interests of brevity it will be impossible to answer all of the statements made. The attempt to include all of the briefs submitted by both sides

in the Supreme Court of Wisconsin only adds confusion since many parts are not pertinent for the purposes of determination of federal jurisdiction.

This writ is requested by your petitioners for themselves and for approximately one thousand other former policyholders of the Wisconsin Mutual Insurance Company who have had an assessment of 100% levied against them, in an amount over $75,000 (R. 34). The acts complained of are those of the Commissioner of Insurance of the State of Wisconsin and of the Supreme Court of Wisconsin, in denying these petitioners certain rights and immunities guaranteed them under the Constitution. These are set up in detail in the petition, incorporated herein by reference for the sake of brevity.

After receiving no actual notice or notice provided for under Wisconsin law in special proceedings, the appellants made two applications to the lower court for trial and hearing. One of these applications was founded entirely upon lack of service and supported by numerous affidavits (R. 34 to 46). Upon the denial of these two orders, dated May 26, 1942, an appeal to the Wisconsin Supreme Court was perfected on these two orders as well as on the original assessment order of November 29, 1941.

I.

FEDERAL QUESTIONS WERE ADEQUATELY ADVANCED AT EARLIEST OPPORTUNITY AND PROPERLY PRESERVED FOR REVIEW BY WRIT OF CERTIORARI

(A) Appellants' Brief in Support of Motion for Rehearing is Properly a Part of the Record Under Wisconsin Supreme Court Practice

We take the definite position that under the practice peculiar to Wisconsin, the brief in support of a motion for rehearing is a proper part of the record, and to certify it otherwise would not be in conformity with the statutory Rules of Practice of the Supreme Court of Wisconsin. (See Appendix I, Section 251.37, Rule 37; Section 251.38, Rule 38; Section 251.39, Rule 39; Section 251.40, Rule 40, and Section 251.41, Rule 41)

These rules provide that the motion for rehearing shall be deemed to be waived unless printed brief in support of the motion is served and filed with the court within a limited time (Rule 40), that the motion is deemed to have been submitted only after printed briefs on the motion have been "served and filed" (Rule 41), and that a motion for rehearing "shall be submitted on printed arguments, of which twenty copies shall be furnished to the Clerk" (Rule 39).

If the brief in support of the motion for rehearing were not a proper part of the record of the Wisconsin Court, the Statute would not, after providing in Section 251.40 (Rule 40) that:

> "The printed arguments in support of the motion *shall be* served (on counsel) and filed (with

> clerk of Supreme Court) within thirty days after the decision . . ."

conclude that:

> "in default thereof the motion shall be deemed to have been waived." (italics and parenthetical matter supplied)

If the printed brief were not a part of the Wisconsin record, the motion for rehearing would necessarily be complete without a printed brief, and a dismissal of the motion for rehearing would be in order for failure to file such a printed brief, *which is not the law of Wisconsin.* In Dierolff v. Winterfield, 26 Wis. 175, 180, we find:

> "The motion, therefore, to dismiss the motion for rehearing, was unnecessary."

This is an entirely different situation than exists in the original presentation before the Wisconsin Supreme Court where oral presentation and affidavits for certain purposes are allowed. It is provided in Section 251.39 (Rule 39) that:

> "A motion for a rehearing shall not be argued orally, but shall be *submitted* on printed arguments, of which twenty copies shall be furnished to the Clerk." (italics supplied)

It will be noted that the submission of the motion is the "printed argument", and that the formal notice of motion is not printed. The only printing in a motion for rehearing is the printed brief while the motion for rehearing itself is a typed, single copy for purposes of notice (R. 141).

This notice is necessary for the purpose of entry of an order to retain the record (R. 142) since otherwise the clerk retains the record only for a period of twenty days "unless all parties interested consent to sooner remit the same" (Section 251.37, Rule 37, and Section 251.38, Rule 38). Under Wisconsin practice, the court loses jurisdiction upon the remission of the record to the lower court, which occurs normally at the end of the twenty-day period, or at the expiration of sixty days from the decision (Section 274.35 (2)), unless an order to retain is entered for the purpose of a motion for rehearing, such as was done in this case (R. 142).

In Pierce v. Kelly, imp., 39 Wis. 569, at 569, when the rule provided for thirty days instead of twenty, but was in other respects the same, the Court said:

> "This motion comes too late . . . this court loses jurisdiction of appeals in thirty days after judgment on them here, unless the jurisdiction is retained *by order of the court for the purpose of a motion for rehearing,* made within that time. The statute makes no other exception, and the court has no power to add others to the statute. . . . Thirty days after the dismissal in this case had elapsed before this motion was made. And the court had lost jurisdiction to entertain the motion, or to deny it with costs. The motion is therefore denied, without costs." (italics supplied)

Also cited are: Pringle v. Dunn and others, 39 Wis. 435, 441, 442.
Bonin v. Green Bay & Minnesota Ry. Co., 43 Wis. 210, 212.

Kalckhoff, Adm'x. v. Zoehrlaut, imp., 43 Wis. 373, 380.
Hopkins v. Gilman, 23 Wis. 512.
Trowbridge v. Sickler, 48 Wis. 424, 4 N.W. 563.

Again it is to be noted that the motion for rehearing itself is not deemed to have been submitted until the printed briefs of the parties (including the printed brief in support of the motion for rehearing) have been "served and filed" within forty days from the decision. Section 251.41, Rule 41, provides:

> "The printed arguments in opposition to the motion shall be served and filed within forty days after the decision, *at which date* the motion shall be deemed to have been *submitted.*" (italics supplied)

We therefore submit that under Wisconsin practice the printed brief in support of a motion for rehearing is a necessary and integral part of the record and of the proceedings. This is unlike the original presentation of a matter before the Wisconsin Supreme Court where affidavits and oral argument are allowed. In a motion for rehearing the entire record and proceedings submitted consist of the original return and the printed brief.

In Bonin v. Green Bay & Minnesota Ry. Co., 43 Wis. 210, supra, we find a case where the court reversed a judgment erroneously entered which was supported by an affidavit as an original appeal matter, the court commenting (p. 212) as follows:

> "In this case, however, the appeal has not been heard. The judgment was reversed under Rule

> 17, without hearing. And the present motion is in effect for the hearing of the appeal. . . . A motion like the present, ought properly, and indeed necessarily, *to be founded upon affidavit and made orally at the bar.* And if not granted within thirty days after judgment, it is sufficiently in the nature of a motion for rehearing, to authorize *the order retaining the record within the statute.*" (italics supplied)

(B) In This Case the Record Shows That the Motion Brief Has Been Sufficiently Certified to Be a Part of the Wisconsin Record

We submit, contrary to the position taken by the Respondent (Respondent's Brief, p. 6) that the motion brief is not only a proper and necessary part of the record under Wisconsin Supreme Court practice, but that the record itself shows it to be a part. We hesitate to gain any support for our viewpoint by way of reciting statements not in the record and therefore uncertified which may have been made to respective counsel by the clerks of the respective courts, i.e., Wisconsin Supreme Court and U. S. Supreme Court, as was attempted by counsel for the Respondent (Respondent's Brief, pp. 2 and 6). We do say that it was proper to advise both clerks of our position on the nature of the Wisconsin practice as well as to advise them of our intention to make use of the so called "surprise" case doctrine which would permit in any event the inclusion of the motion brief as a part of the record of the U. S. Supreme Court, even if not a part of the Wisconsin Court record.

In taking this viewpoint we are well aware of the un-

fortunate situation which occurred in the case of McGarrity v. Delaware River Bridge Commission, 292 U. S. 19, 20, 54 S. Ct. 565, 78 L. Ed. 1095. It seemed quite proper to us to follow the suggestion made in Robertson & Kirkham's textbook, "Jurisdiction of the Supreme Court of the United States", page 121, footnote 41:

> "Where the record filed in the Supreme Court is unprinted, counsel who intend to rely upon the doctrine of the 'surprise' cases should so advise the Clerk of the Supreme Court. Otherwise, in printing the record, he may omit the petition for rehearing if it was denied without more, pursuant to the general order of the court requiring him to omit immaterial matter."

In fact, we cannot see how the clerk of the Wisconsin Supreme Court could make the affidavit required (R. 210):

> ". . . the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same in the above entitled case in said court",

without including the motion brief which is undisputedly on file, as part of the jurisdictional proceedings, and without which the motion for rehearing would not have been consummated.

In addition the clerk also certified the completeness of this motion brief for the purpose of the record, as follows:

> "I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the attached printed Appellants' Brief in Support of Motion for Rehearing *is a full*

> *and complete copy* of the printed Appellants' Brief in Support of Motion for Rehearing in No. 83, August Term, 1942, and *submitted* to the court on said motion, and of the *whole thereof.*
>
> (SEAL) In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 17th day of March, A. D. 1943. (signed) ARTHUR A. McLEOD Clerk of Supreme Court of Wisconsin"

(Italics supplied—not printed, but in original return, between R. 209 and R. 210)

The motion brief was also incorporated in the record by way of the formal notice of the motion for rehearing, which caused the court to enter its order retaining the record (R. 142), the pertinent parts of which are as follows:

> ". . . upon all of the records, files and proceedings served, filed and had herein or made part thereof by reference or incorporated herein as completely as though it were fully and in detail set forth herein . . ." (R. 141)

A part of these "files and proceedings served, filed and had herein" was the printed motion brief as required under Section 251.40 of the Wisconsin statutes and Rule 40 of the Wisconsin Supreme Court Rules of Practice, and was filed as required within thirty days "after the decision". Where there has been a failure to print, serve and file a printed brief in support of a motion for rehearing, the Wisconsin practice would not record any motion to dismiss

because a failure to finish and complete a motion for rehearing is the same as the lapse of the time for making such a motion.

(C) Not Only is the Motion Brief a Part of the Record Under the Practice as it Exists in Wisconsin and was Necessarily So Certified by the Clerk of the Wisconsin Court, but This Case Comes Under the Well Defined Qualification or Exception to the General Rule as to Timely Presentation

The general rule is to the effect that ordinarily federal contentions first made in a motion for rehearing to the state court will not be considered where the motion is denied without more. The first qualification or exception to this rule is that the state practice must afford the litigant an opportunity to have the claimed federal right heard and determined. The second qualification, supported by a number of cases, is that where it is the act of the State Supreme Court itself, done in its opinion and decision and coming unexpectedly at the end of the proceeding when the appellant no longer had any opportunity to add to the record, which denies appellant a federal right and thus, for the first time, imports into the case the federal question sought to be reviewed, a raising of the question for the first time in a motion for rehearing will be deemed to be timely.

We find this principle well stated in the leading case on the subject, Saunders v. Shaw, 244 U. S. 317, 320, as follows:

> ". . . but when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the

> record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. . . . It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing, the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more he could have done."

Another case in which this is well stated is Missouri v. Gehner, 281 U. S. 313, 320:

> "But here the company, at the first opportunity, invoked the protection of the federal constitution and laws of the United States. . . . It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection. . . . Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the state the federal questions here presented and is entitled to have them considered."

In Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 681, we find this:

> ". . . But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether

> acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

See also Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 366-367.

(1) The Further Raising of the Federal Questions was Postponed at the Request of the Court Before the Decision and Hence the Raising of the Federal Questions in the Motion Brief was Timely

The above qualification or exception to the general rule may be subdivided into two parts—the first relating to what actually happened in the Supreme Court in this particular case, in that a decision was rendered without allowing the appellants (petitioners here) an opportunity to present the questions of due process of law before the court rendered its decision, and thereby compelled the appellants to take them up in their motion brief for rehearing.

This was stated in the opening sentences of the appellants' motion brief (R. 153) as follows:

> "This motion was made necessary for the following reasons: First, because at the suggestion of the court, at the time of the hearing, the questions which were raised in the two petitions of the appellants, heard on April 1st and April 24, in the court below, were reserved and were not ruled upon. These questions are of vital interest to the appellants."

and this was further stated in (R. 154-155) quoting from the motion brief filed by the appellants, as follows:

> "Many of the questions involved were not raised because of the suggestion of the court and it will be noted that in the opening statement of the appellants' [redacted] brief (page 2) it was said:
>
> > 'In view of the suggestion by the court, that if it consider the appeals from the orders of May 26, 1942, material, it will call for further briefs, and therefore we refrain from discussing these orders and our right to have the order of November 29, 1941, reopened, based upon the petitions to which these orders related and the right of the trial court to consider such petitions'."

No such opportunity to present these federal questions, as the court indicated it would give, was offered to the appellants, and they had delayed their arguments on the same until their motion brief, in reliance upon the expectation of such opportunity. This case then represents a novel situation within the exception to the general rule, i.e., where the state practice must afford a litigant an opportunity to have the claimed federal right heard and determined. If the federal question is raised at its earliest opportunity and the state court refuses to pass upon it, it will be deemed to have been necessarily passed upon adversely to the rights of the appellants.

(2) Questions of Lack of Service, Trial and Due Process Were Preserved in the State Courts for Review on Federal Grounds

Petitioners (appellants in state court) advanced in their briefs, based on the record, questions of lack of service, lack of trial and lack of due process of law on which to base their federal rights and immunities under the 14th Amendment in the Supreme Court of Wisconsin. Said court prevented their review and compelled appellants to state these federal questions for the first time in their brief in support of the motion for rehearing, due to the surprise ruling.

Questions of lack of service, trial and due process were preserved as revealed by the record in the State Supreme Court and were urged in the first brief for review. Counsel for the Respondent takes the position (Resp. Brief, p. 9) that questions of lack of service and due process of law were not urged in the brief of the appellants (petitioners here). This is not a true statement as an examination of the first brief filed (Appendix II herein) shows that these points were brought to the court's attention at some length. This is adequately proved by an examination of the record which states, from this motion brief, the pertinent sections as follows (R. 175-177):

> "Because of the many questions left to be decided, as revealed above, and because these appellants have been denied a trial in the circuit court, the appellants wish to emphasize a point which was urged both in the circuit court and before this court, viz., that the order here is without validity and is entirely void because no service or notice of any kind was given. . . .

"In the brief of the appellant it was stated (p. 8—now Appendix II herein):

> '. . . The order entered on that day provided for no other or further notice to policyholders of intention to levy an assessment than the publication of a simple notice of hearing in the Wisconsin State Journal at Madison. This was the extent of the notice though on the assessment hearing, Mr. Yaudes, Deputy Liquidator, testified that between January 1, 1937, and February 1, 1941, over 15,000 policies were issued to about 9500 policyholders scattered throughout the state. (R. 149, C. 61) No notice of assessment was served or directed to be served upon the company or its officers.'

"And further, in the Appellants' brief, page 13, (Now Appendix II herein):

> '. . . This petition was supported by the affidavits of 49 policyholders from all parts of the state and was grounded upon the proposition having been entered without personal service of notice upon the policyholders and indicating clearly that large numbers of the policyholders had no notice in fact, . . . and upon questions of jurisdiction.'

"The court has failed to give any decision on this point which involves fundamentally, because of lack of service, the jurisdiction of the order of November 29, 1941. Failure to give notice or the notice required under the statute, becomes fundamentally a question of due process of law under the 14th Amendment to the Constitution of the United States, which reads as follows:

> '. . . No State shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.'
>
> "Therefore this question cannot be ignored and if the court does not grant a rehearing, this issue will be wide open for adjudication against policyholders on their assessment." (Parenthetical material supplied)

Counsel for the respondent himself admits (Respondents' Brief, in opposition to Motion for Rehearing, p. 6) the raising of these questions in the circuit court. Lack of notice and the right to trial and the lack of due process of law were brought to the court's attention in brief filed (Appendix II herein) at pages 7, 12, and 13, and of course at considerable length in the Appellants' Motion Brief (R. 153, 154, 155, 156, 159 and 175-197), which of course is admitted by counsel for respondent in his brief (Respondent's brief, p. 8).

It is to be noted that counsel for appellants complied with the request of the state court as stated in the appellants' brief (R. 153) and did not raise any of these questions in the reply brief then to be printed and filed (Appendix III herein). It should be noted also that the appellants, under Rule 17 (Section 251.17 Wis. stats.) had a right to file a reply brief.

In addition to briefs filed by counsel in the Circuit Court for Dane County, the record shows that the questions of service and due process were emphasized in said proceedings.

In the order to show cause, heard below on April 24, 1942 (R. 34) the petitioner stated:

> "... that from his investigation of the facts and interviewing numerous policyholders, as well as from his own experience, the policyholders were not informed as to the basis of or the nature of the assessment made by the order of November 29, 1941; that an examination of the record in this case indicates that neither the petition nor the plan of assessment was ever served upon the insurance company, its officers or policyholders, the only service being by publication in the Wisconsin State Journal (Madison, Wis.) while policyholders affected to the extent of about 10,000, lived in all parts of the state ..." (parenthetical material supplied)

and further stated (R. 39):

> '... and of the failure of the Commissioner of Insurance to give adequate notice to the policyholders of the plan of assessment proposed by him ...'

Approximately 44 affidavits were attached to said order to show cause, and were incorporated therein by reference and made a part thereof, stating in substance (1) that the "First Notice of Assessment" (which in most cases was received during December, 1941, and January, 1942) was the first information that these affiants had of any assessment levied against them, and (2) that they did not read or see in any newspaper, including the Wisconsin State Journal, any published notice of the order to show cause which resulted in the assessment order of November 29, 1941, and (3) that they had no notice of any intention to

assess, or of indication that they were liable to assessment (R. 43-46).

These contentions were further supported by the affidavits of five other policyholders (petitioners here), stating that they had talked to more than 600 policyholders (R. 40-43) living in all parts of the State of Wisconsin.

(3) The Following Federal Questions Were Unexpectedly Injected Into the Proceedings at the Time of the Decision by the Wisconsin Supreme Court and Necessarily Decided on by the State Court

(a) Lack of Due Process is Shown by Failure to Give Proper Notice, or to Make "Service by Publication in Special Proceedings"

It was unanticipated and unexpected that the court would rule that

> "the order (the order to show cause for assessment) came on for hearing on November 10, 1941, *due notice thereof having been given* . . ."

(R. 128) since the statute (Wis. stats. 262.14) provided that in all special proceedings where service was to be had by publication, there should be

(a) proof by affidavit or other evidence in order to authorize service for such publication "before entering judgment against any defendant . . ." (Section 262.13, Appendix I herein)

(b) publication in a newspaper "likely to give notice to the defendant" (Section 262.13 (2), Appendix I herein), and

(c) in case the defendant's post office address is known or can be ascertained, it is required that

> he be mailed a copy of the summons and complaint or notice of the object of the action (Section 262.13 (2), Appendix I herein)
> (italics and parenthetical material supplied)

The Supreme Court of Wisconsin itself ruled, in this case, in correcting a reference by respective counsel to the use of the word "judgment" in respect to the November 29, 1941 finding, that this was a special proceeding, and cited Section 270.53, Wis. Stats. (R. 126).

None of the procedure above (a), (b), and (c), was followed. The record (R. 8) shows that notice was given merely by publication in the Wisconsin State Journal, located at Madison (Wis.), a newspaper *not* "likely to give notice to the defendant"—in this case, 10,000 former policyholders residing in all parts of the State of Wisconsin. There is nothing in the record to show that this publication was to be made or was made in an official state paper as stated by counsel for the respondent (Respondent's Brief, pp. 2 and 12).

The approval of the procedure used in securing jurisdiction of policyholders was unexpected in that it was not the accepted publication procedure approved by the Wisconsin Supreme Court in past decisions, as will be seen by an examination of the following cases:

> Voelz v. Voelz, 80 Wis. 504, 50 N.W. 398
> Oelbermann v. Ide, 93 Wis. 669, 68 N.W. 393
> Anderson v. Coburn, 27 Wis. 558
> Witt v. Meyer, 69 Wis. 595, 35 N.W. 25
> Frisk v. Riegelman, 75 Wis. 499, 43 N.W. 1117, 44 N.W. 766
> Roosevelt v. Ulmer, 98 Wis. 356, 74 N.W. 124

State ex rel. Bergougnan Rubber Corp. v. Gregory, 179 Wis. 98, 190 N.W. 918
Roosevelt v. Land & River Company, 108 Wis. 653, 84 N.W. 157
Hafern v. Davis, 10 Wis. 501

It is the general rule, since service by publication was unknown to the common law and depends upon statutory authorization, that there must be a strict compliance with the law. This is exemplified in the cases involving the construction and application of the provisions authorizing substituted and constructive service.

Beckett v. Cuenin, 15 Colo. 281, 25 P. 167, 22 Am. St. Rep. 399;
State ex rel. Palmer v. Gray, 92 Fla. 1123, 11 So. 242, citing RCL
Zecharie v. Bowers, 1 Smedes & Miss. 584, 40 Am. Dec. 111
Stewart v. Stringer, 41 Mo. 400, 97 Am. Dec. 278
Erickson v. Macy, 231 N. Y. 86, 131 NE 744, 16 ALR 1322
Grannis v. Ordean, 234 U. S. 385, 58 L. Ed. 1363, 34 S. Ct. 779
Noble v. Union River Logging R. Co., 147 U. S. 165, 37 L. Ed. 123, 13 S. Ct. 271
Cheely v. Clayton, 110 U. S. 701, 28 L. Ed. 298, 4 S. Ct. 328
Galpin v. Page, 18 Wall. (U. S.) 350, 21 L. Ed. 959
Harris v. Hardeman, 14 How (U. S.) 334, 14 L. Ed. 444

This includes the requirement that the affidavit required by statute is essential for valid service and is a prerequisite to a valid judgment.

Beckett v. Cuenin, 15 Colo. 281, 25 P. 167, 22 Am. St. Rep. 399
Correll v. Greider, 245 Ill. 378, 92 NE 266, 137 Am. St. Rep. 327
Baker v. Baker, E. & Co., 162 Ky. 683, 173 SW 109, LRA 1917C 171, affirmed in 242 U. S. 394, 61 L. Ed. 396, 37 S. Ct. 152
Gilmore v. Lampman, 86 Minn. 493, 90 N.W. 1113, 91 Am. St. Rep. 376
Barber v. Morris, 37 Minn. 194, 33 N.W. 559, 5 Am. St. Rep. 836
Palmer v. McMaster, 13 Mont. 184, 33 P. 132, 40 Am. St. Rep. 434

The case of Pink v. A.A.A. Highway Express Co., 314 U. S. 201 (Respondent's Brief, p. 13) is not in point as appears on the very face of the quotation,

> ". . . when made in conformity to the statutes of the state of its organization."

In this case actual mail notice was given in conformity to Section 422, N. Y. statutes:

> "pursuant to Section 422 and the order, the superintendent mailed notice of the order to each policyholder, including respondents . . ."

It is this lack of conformity with the "statutes of the state of its organization" that we complain about in the present case.

In the case of "Application of Whitman", 186 Wis. 434, and in the case In Re Builders Mutual Casualty Co., 229 Wis. 365, cited by counsel for respondent (Respondent's Brief, p. 13), we find that publication was had in several newspapers throughout the state, in the Whitman case in

four (4) newspapers. In the Builders Mutual case there was no restraining order entered against the officers of the company as in this case, so that both cases cited are distinguished from the present one in these two essential points. (For further discussion see Appellants' Motion Brief, R. 175-183.)

THERE IS NO STATUTORY PROCEEDING IN WISCONSIN OTHER THAN SECTION 262.14 APPLICABLE TO LIQUIDATION PROCEEDINGS

An examination of Sections 200.08 and 200.09 of the Wisconsin statutes, which make applicable the provisions of Section 220.08 (cited by respondent, Respondent's Brief, p. 14, and printed in the Appendix thereto) reveals no provision for such publication—the closest approach to the same being in subsection (6) of 200.08 which states:

> "to carry out the purposes of this section, the Commissioner shall have power, subject to the approval of the court, to make and prescribe such rules and regulations as to him shall seem proper . . ."

This, however, applies to "rules and regulations" and does not apply to the proposition of securing jurisdiction necessary to make a valid order against policyholders.

To hold that adequate notice was given in this case would be to ignore the requirement of due process that a person affected by the judgment sought must have notice and an opportunity to defend. The notice required in Wis. Stats. 262.14 and 262.13 is reasonable, and would, in gen-

eral, give knowledge of such a proceeding and an opportunity to be heard. But the provisions cited by counsel for the respondent are not reasonable and therefore lack due process of law.

According to counsel's contention in re 220.08, the commissioner and the court could prescribe "no notice" or inadequate notice, which is not reasonable. Such inadequate notice, however, was given in this case. We do not dispute the fact that the commissioner had jurisdiction to liquidate this company, nor that he was in charge of its assets, but we do dispute the question of proper service, which is a federal question of due process of law under the 14th Amendment.

NO CONSTRUCTIVE SERVICE WAS MADE ON POLICYHOLDERS BY WAY OF SERVICE OR NOTICE ON COMPANY OR ITS OFFICERS

Since no service was made under any statutory authority in Wisconsin, we may well look to see if service was made upon the company or its officers as representatives of the policyholders. The record (R. 8) shows that no such service was made. In this case neither the company nor its officers were summoned into court. In order that there be a judicial determination which would bind the policyholder, the company or its officers must have been served. But where there is no statutory procedure and no valid decree against a company, as representative of the policyholders, then any judgment or decree in which the policyholder's liability is summarily disposed of behind his back, without

notice or without a hearing, lacks due process of law. (For further dscussion of the law see Appellants' **Motion Brief,** R. 183-192).

It was so held in Christopher v. Brusselback, 302 U. S. 500, where the court decreed that all stockholders were liable for a 100% assessment. The court stated:

> "... There is nothing in the statute relating to the organization of Federal **Land Banks and** the imposition of the stockholders' liability to suggest that by virtue of their membership in the corporation the stockholders can be said to have subjected themselves to a procedure of determining *in their absence* the essential conditions of liability, or to have relinquished their right to contest, as in any other litigation, every step essential to its establishment . . ." (italics supplied)

We are glad to see that counsel for respondent has abandoned his former theory that personal service upon the company or its officers is service upon the policyholders (Respondent's Brief, p. 15) and agrees that this would be a useless formality in view of the fact that the company was practically defunct and could take no action except under the direction of the court. We can agree that the company's presence in the proceedings was necessary to give the court jurisdiction of its property and assets and to liquidate the company, but we disagree with the contention that this automatically gave notice to policyholders. In view of the fact that the said officers were enjoined and restrained from exercising any corporate privileges it would be a pure legal fiction to say that after that

date the policyholders were or could be represented by the corporation.

The situation is entirely different from that in Hawkins v. Glenn, 131 U. S. 319, in which the corporation continued to function. In the present case, the primary right to be adjudicated is the policyholder's liability.

Finney v. Guy, 106 Wis. 256
Blum Bros. Box Co. v. Stumbaugh, 207 N.W. 270 (Wis.)

The cases cited by counsel (Respondent's Brief, bottom p. 15) do not help because they are founded on a notice by publication which is *in accordance with the state statute* which is not the situation here.

APPEARANCE OF POLICYHOLDERS BY COMMITTEE TO SET ASIDE JUDGMENT IS NOT WAIVER OF THEIR RIGHTS TO OBJECT

It is the general rule of law that there is no waiver on the part of policyholders by making [redacted] appearance even if coupled with a plea on the merits. (See Appellants' Motion Brief, R. 194-197)

2 R.C.L. section 13, p. 332
4 Corpus Juris, "Insurance", sub-title "Void and Legal Process", p. 1557
Coleen v. Figgins, 1 Ill. 19
Wilbright v. Wise, 4 Blackf. (Ind.) 137
Castle v. Thomas, 16 Minn. 490
Godfrey v. Valentine, 39 Minn. 338, 339
Correll v. Greider, 245 Ill. Rep., 378, 380-381
Estate of Kronglaski, 222 Wis. 634

(b) It was Unanticipated and Unexpected That the Court Would Rule That Refunds Were an Adequate Means of Correcting the Amount Owed by Individual Policyholders on the Assessment (R. 131)

This does violence to the statute, the Articles of Incorporation of the Wisconsin Mutual Insurance Company, and its by-laws, and represents an impairment of the obligation of contract under Article I, Section Ten, of the U. S. Constitution.

This was a 100% assessment of the premiums previously paid by policyholders during the period January 1, 1937, to February 1, 1941. As such it assessed all regardless of whether or not that represented the just proportion of the policyholder's contractual liability. The assessment approved by the court is the reverse of what the contract provides for and what the law requires in that the liquidator proposes to collect all he can and allot the collection to the period for which some liability exists, instead of determining the liability in advance and making the assessment accordingly. In the last analysis, this assessment amounts to a command to the policyholder:

> "You pay us the full amount of your maximum liability; we will then determine what you are liable for and if anything is left, you will get it back."

The liquidator testified that he might use the contributions made for 1939 liability to pay for 1937 or 1938 losses (R. 69) as follows:

> "In collecting of assessments, it is possible that the money the policyholder contributes by

> assessment for a policy outstanding in 1939 could be used to pay losses incurred in 1938, because you would collect an assessment on all policyholders for a period, and it is possible that a policyholder within 1939 would pay this assessment . . . The cash which is received from these assessments goes into one big pool to pay losses covering any time from January 1, 1937, until February 5, 1941."

The liquidator, however, testified and admitted that an allocation of losses and expenses and of premium liability by monthly amounts had been made (R. 108-109).

There was no finding as to the amount necessary to pay liabilities for any part of said period as to policyholders who were members only during a part of the period. Yet it is agreed that a policyholder is liable only for losses and expenses incurred during the period he was a member.

We direct especial attention to the year 1938 in which operations were profitable in five out of the twelve months (R. 192). This is set up in detail in a table in Appellants' Reply Brief, pp. 5-9 (Appendix III herein). In fact, the first six months of operation showed a net surplus of $839, yet every member who belonged to the company during any part of this period was assessed 100% of the earned premiums, in the total amount of $45,815.00. The policyholders who were members only during this 6 months' period of time are not liable for one penny of assessment under the law and under their contract.

We had anticipated that this method would not be approved since it was condemned by the Wisconsin Supreme Court in Davis v. Parcher, 82 Wis. 488, 498:

> "The assessment is a horizontal one,—just forty per cent of the face of each note, without regard to whether that is or is not the just proportion of the losses and expenses which occurred during the life of each policy, and hence properly chargeable to the maker of the note, and also without regard to the amount which had been paid on such note. It appears that this assessment requires some members of the company to pay a proportionate share of losses which occurred before they became members. This violates a cardinal rule of mutual insurance, as well as the rule of the statute."

Sincee losses varied considerably from year to year, it was illegal to assess uniformly for the entire period. This inequity is aggravated by the failure to establish liabilities in advance of the assessment.

Also the decision was a surprise ruling and especially unexpected and unforeseen in view of the court's intimation, in In Re Builders Mutual Casualty Co., supra, 383, as follows:

> "We say no more upon this because of the fact that we are not dealing with the first assessment but with the second. The first assessment was levied upon precisely the same basis as was this. Had the same objection been made then as is made here, *it may very well be that this court might have been compelled to sustain it. At least, a showing could have been made that would start the liquidation off upon the right principle if the company's books and the whole situation was in such shape as to make this practical.* . . . It may well be, in view of the instalment method of discharging incurred loss-

> es on workmen's compensation policies, that a liberal portion of the claims now outstanding are for losses incurred in the later years. To now open up the assessment and change the whole basis upon which it is levied, would, it seems to us, require a re-examination of the whole basis of the first assessment and a re-adjustment that would make the second assessment equitable, in view of the basis for the first assessment . . ."

Your petitioners relied, in the present liquidation proceedings, upon this indication because this was a first assessment and there had been an allocation of losses and expenses to the particular month, and an allocation of the earned premiums to the particular month, as is shown by the liquidator's bookkeeping method, so that the difficulty confronted in the Builders Mutual liquidation was not involved in this present liquidation. Your petitioners had a right to rely upon this intimation of the court and the said decision was therefore unexpected and unanticipated. The bookkeeping method was set up in complete form and stated:

> "the amount allocated to the time any particular policyholder was a member may then be ascertained by summation of the appropriate monthly totals."

(c) It was Unexpected and Unanticipated That the Court Would Rule That This Assessment Should be Based on "Earned Premiums" Rather than on "Annual Premiums" Which Raises a Federal Question

The different policies of the Wisconsin Mutual Insurance Company restricted contingent liability in the following language:

> "The contingent liability of the assured under this policy is limited to an amount equal, and in addition, to the annual premium stated in the policy." (R. 86-88)

The statutes also require whatever contingent liability is imposed to be assessed on the basis of the "annual premium" (Section 201.02 (5), Wis. Stats.). This assessment, however, was based on the earned premium rather than on the annual premium (R. 68) and this was approved by the court (R. 140). This violates the Articles of Incorporation of the company, the contract of insurance and the statutes, and deprives these petitioners of property without due process of law under the 14th Amendment. It also impairs the obligation of contract under Article I, Section Ten, of the U. S. Constitution. The injustice which results cannot be calculated at this time without a hearing and a trial but some of the facts are disclosed in the record (R. 24-25, paragraph 13).

This illustrates, however, how erroneous the approach to these assessments was, how necessary the trial was which has been denied, and how little attention has been paid to the contracts entered into by these petitioners.

(d) It was Unanticipated and Unexpected That the Court Would Rule Against Separate Assessments for Losses and Expenses in Public Liability and Automobile Policies

The court failed to approve separate assessments for losses and expenses relating to liability insurance business (201.04 (5) Wis. Stats.) as distinct from automobile insurance business (201.04 (15) Wis. Stats.). This violated

Article I, Section Ten, of the U. S. Constitution and constitutes a taking of property without due process of law under the 14th Amendment. The company was authorized to do general casualty business. It has always been held that premium notes given in one department of a company maintaining two separate departments under its charter and by-law provisions, would have to be treated entirely separately and one department could not be assessed for losses incurred in the other.

Allen v. Winne, 15 Wis. 113, 120-122.

It was further enacted into the law in Wisconsin (201.05 (2) (e)) that

> "there be maintained separate and distinct reserves in trust for each kind of insurance so written."

In the Builders Mutual Casualty Co. case, supra, the court again gave approval to this principle and said:

> ". . . It is equitable and fair to levy an assessment upon the policyholders in that branch of the company's activities whose premiums are insufficient to carry the risk against which they are insured . . ."

In this present case, the company had earned premiums of $9,581.09 on public liability against which it had total losses and expenses of $11,000 (R. 54). In other words, there was a net underwriting loss of $1,419 for which an assessment of $9,581.09 is being levied, or the order calls for each policyholder to pay an additional dollar for every dollar of premium collected. The court refused to modify the assessment partly on the ground that

> "... It does not appear that any liability policyholder is complaining"

although the record shows the need for trial and the fact that complaint was made (R. 23) as follows:

> "11. The Wisconsin Mutual Insurance Company wrote two kinds of insurance, automobile insurance and public liability insurance, as these terms are defined in section 200.04, Wisconsin Statutes. No segregation of liability is made in the assessment proceedings for liabilities resulting from the automobile business as distinct from the public liability business. Neither are the policyholders segregated or the experience under each class or kind of insurance shown. Under the method of assessment employed, policyholders for public liability will be required to pay liability for automobile insurance losses, and vice versa. Likewise, liquidation and other expense being lumped, so far as appears in this proceeding, it will be shared by persons who were not responsible therefor and for that reason the present assessment does not meet the requirements of law."

These petitioners, in their [redacted] brief (R. 159) offered to submit a list of public liability policyholders (in excess of six) whom they represented. No evidence, to indicate on what basis liquidation expenses were allocated to these operations or whether any liability still remained on these particular policies, was offered because no trial was allowed.

By refusing trial, there was nothing in the record to show that there was a single dollar of unliquidated or liquidated claims pending at the time of liquidation so far as public liability claims were concerned. In view of the law and the Articles of Incorporation and by-laws of the com-

pany, and the policy contracts, these petitioners were surprised and could not have anticipated such a ruling, denying them federal rights and immunities.

(e) It Was Not Anticipated That the Court Would Attempt to Rule on All Contested Matters Without Trial in Lower Court

Regardless of the sufficiency of the notice or whether such notice had any statutory justification, your thousand and more petitioners (with the exception of one or two) had no notice at all of the hearing which resulted in the November 29, 1941 assessment order which fixed their liability (R. 34-46). They were refused their day in court with more than $75,000 of their money at stake. (R. 34) The November 27, 1941 hearing which resulted in the November 29, 1941 order of assessment, was a default hearing. Testimony was given by only one witness, for the Insurance Commissioner. Appearances were made by only three (R. 10, 5, 7) out of 9,500 policyholders (R. 61), all of whom requested adjournment (R. 76-77, 82).

On pages 9 and 10 of the petition to the Supreme Court of the United States, these petitioners set out twelve contentions which were given in their order to show cause requesting trial. Many of these questions have not been passed upon by the State Supreme Court although the orders denying these petitioners a trial to hear such contentions have been affirmed, and many other questions have been passed upon with no evidence allowed to be presented by these petitioners. (Nov. 29, 1941 order and May 26, 1942 orders)

We contend therefore that regardless of what the result of a trial might have been, or might now be, these petitioners were entitled to a trial and full hearing, and that such trial and hearing were a matter of right and not of favor or discretion.

Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027, 35 S. Ct. 625

Lynde v. Lynde, 181 U. S. 183, 45 L. Ed. 810, 21 S. Ct. 555

People's Wayne Co. Bank v. Wolverine Box Co., 250 Mich. 273, 230 N.W. 170, 69 A.L.R. 1024

Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

WISCONSIN STATUTES

I. SERVICE BY PUBLICATION:

Section 262.14

"262.14 *Service by publication in special proceedings.* Service by publication of any process or notice in any special proceeding, except probate proceedings, may be made when the plaintiff is unable with due diligence to make service of such process or notice upon the defendant or party upon whom service is required. Such publication proof thereof shall be made as required by section 262.13."

(Supreme Court Order, effective July 1, 1941)

Section 262.13

"262.13 *Publication or service outside state; proof of grounds: mode of service.*

"(1) Before entering judgment against any defendant who has been served with summons by publication or personally without the state pursuant to Rule 262.12 and who has not appeared, the court shall require proof by affidavit or other evidence to be made and filed of the nonresidence of the defendant where not shown by the verified complaint and of the existence of any other fact not shown by the verified complaint and necessary to authorize service to be made by publication and that the service was in fact made as the rule requires. The court may require additional proof. Said proof shall be conclusive in all collateral actions and proceedings.

"(2) Service of the summons by publication shall consist of its publication in a newspaper likely

to give notice to the defendant to be published once a week for three weeks and in case the defendant's post-office address is known or can be ascertained, by mailing him a copy of the summons and complaint, or a notice of the object of the action, as the case may require. The mailing may be omitted if the post-office address cannot be ascertained.

"(3) The summons and a verified complaint shall be filed prior to the first publication, and prior to the mailing."

Section 262.12

"262.12 *Publication or service outside state, when permitted.*

"When the summons cannot with due diligence be served within the state, the service of the summons may be made without the state or by publication upon a defendant when it appears from the verified complaint that he is a necessary or proper party to an action or special proceeding as provided in Rule 262.13, in any of the following cases:

"(1) When such defendant is a nonresident of this state or his residence is unknown, or is a foreign corporation, and the defendant has property within the state, or the cause of action arose therein, and the court has jurisdiction of the subject of the action, whether the action be founded on contract or tort.

. . .

"(6) When the action is against any domestic private corporation and the proper officers on whom to make service do not exist or cannot be found."

(Supreme Court Order, effective Sept. 1, 1931; Supreme Court Order, effective Jan. 1, 1936)

II. SUPREME COURT RULES OF PRACTICE:

MOTIONS

"(251.37) *Rule* 37. ~~The papers in any cause wherein a mo~~ Every motion for a rehearing shall be filed within twenty days after the decision, and the clerk shall retain the papers till the expiration of such period, unless all parties interested consent to sooner remit the same."

"(251.38) *Rule* 38. The papers in any cause wherein a motion for a rehearing is made shall be retained until the motion shall have been disposed of."

"(251.39) *Rule* 39. (As amended January 11, 1913.) A motion for a rehearing shall not be argued orally, but shall be submitted on printed arguments, of which twenty copies shall be furnished to the clerk."

"(251.40) *Rule* 40. (As amended June 29, 1933.) The printed arguments in support of the motion shall be served and filed within thirty days after the decision, and in default thereof the motion shall be deemed to have been waived."

"(251.41) *Rule* 41. (As amended June 29, 1933.) The printed arguments in opposition to the motion shall be served and filed within forty days after the decision, at which date the motion shall be deemed to have been submitted."

III. OTHER WISCONSIN STATUTES

Section 201.02

"201.02 *Organization; articles; amendments; name.*

. . .

"(5) The articles of a mutual insurance company may limit (but to be effective the limitation must be expressed in every policy):

"(a) The insurance to specified kinds or classes of property, lives, individuals or liabilities;

"(b) the territory within which insurance shall be granted; or

"(c) *the liability of members, which liability shall be a specified number of times the annual premium.*"